

PHAM (Migration) [2017] AATA 3127 (14 March 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Hieu Minh Pham
VISA APPLICANTS:	Mrs Thi Minh Thang Hoang Miss Huong Thao Hoang Master Minh Tuan Hoang
CASE NUMBER:	1609341
DIBP REFERENCE(S):	OSF2015/070870
MEMBER:	Adrienne Millbank
DATE:	14 March 2017
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas.

Statement made on 14 March 2017 at 5:09pm

CATCHWORDS

Migration – Cancellation – Partner (Provisional) (Class UF) visa – Subclass 309 (Spouse (Provisional)) – Validly married – Bank transfers from the Sponsor to the applicant – Large wedding ceremony – Holidayed together – Close relationship between Sponsor and step child – Nature and depth of their conversations – Photographic evidence provided – No convincing evidence – Decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15A Schedule 2 cls 309.211, 309.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 9 June 2016 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the visa applicant) applied for the visa on 18 March 2015 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211 and 309.221.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) and 309.221. He was not satisfied that the parties were in a genuine and continuing spousal relationship.
4. The review applicant appeared before the Tribunal on 24 February 2017 to give evidence and present arguments. He was assisted at hearing by a Vietnamese interpreter, as his English is limited. The Tribunal also received oral evidence from the applicant in Vietnam.
5. The review applicant was represented in relation to the review by his registered migration agent, who attended the hearing.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

BACKGROUND

7. The sponsor was born in Vietnam in 1967. He arrived in Australia in 1983 and obtained Australian citizenship by grant in 1988. He has one previous marriage. He sponsored his first wife from Vietnam in 2008. He divorced her in November 2013. There are no children from this marriage.
8. The applicant was born in Vietnam in 1975. She has two children from a former marriage, born in 1996 and 2001, both of whom are included in the review application as dependent secondary applicants. She obtained a divorce from her first husband in August 2014.
9. The applicant's daughter arrived in Australia on a student visa in October 2013. She met the sponsor at the house of a friend and relative. She claims that she felt an immediate affinity with the sponsor, identifying as his step-daughter. On learning that he was recently divorced, and knowing that her mother was lonely, she provided him with her mother's phone number.
10. The applicant claims that their relationship developed quickly, over the phone, following the sponsor's first contact with her in December 2013 on New Year's Eve.
11. At time of review the applicant's daughter, a secondary applicant, was in her final year of studies in accountancy at Griffith University, the applicant was employed as an accountant in the Vietnam Union of Science and Technology Associations, and the sponsor was employed on a piece-work basis as a chicken-boner, a job he has been doing for 30 years.

12. The parties married in Vietnam on 24 November 2014. As noted, they lodged their Partner visa application on 18 March 2015. They were both interviewed by telephone in February 2015 and the applicant was interviewed in person on 12 November 2015. Their application was refused on 9 June 2016.
13. The sponsor has made six trips to Vietnam in association with the relationship and Partner visa application: on 17 July–8 August 2014 (the parties first met in person on 17 July 2014); 17 November–12 December 2014 (when the parties married); 28 January–17 February 2015; 28 August–5 November 2015; and, following the refusal of the visa application (on 9 June 2016) 3–12 September 2016; and 21 January–9 February 2017.
14. The parties' agent provided a lengthy written submission in support of the review application, and the parties also provided a joint written submission in response to the Departmental decision report. A large amount of evidentiary material, organised and labelled, was attached. This included organised bundles of the parties' photographs when the sponsor was in Hanoi on 17–24 July 2014; the parties' photographs when the sponsor was in Hanoi from 17 November–12 December 2014; the parties' wedding photographs; the parties' photographs when the sponsor was in Hanoi from 28 January–17 February 2-15; the parties' photographs when they went on a tour together to Da Nang and Hoi An together on 5–8 February 2015; the parties photographs when they travelled to Quy Nhon on 30 August–to 2 September 2015; the parties' photographs when they were in Saigon and when they went on a tour to Cambodia in September 2016; the parties photographs when the sponsor was in Hanoi on 21 January–9 February 2017; and the parties' photographs at their joint birthday party celebration.
15. It included a new written statement from the applicant's daughter who introduced the parties and is a secondary applicant; four witness statements; copies of money transfer receipts; the sponsor's superannuation beneficiaries statement; a copy of the parties' wedding invitation; receipts for the cost of the wedding dress, the wedding luncheon and the wedding photography; regional district temporary stay confirmations; copies of hotel receipts; copies of phone bills, air tickets, tour and entry tickets; records of Viber and Tango phone calls and 'message extracts'; and documents related to the applicant's divorce.
16. The Tribunal has examined and considered all of this material, as well as material on the Departmental file that was provided at time of application.
17. The issue in the present case is whether the parties were in a genuine spousal relationship at time of application and review. Issues of concern identified by the Tribunal to be explored at hearing included the role of the applicant's daughter in arranging the relationship; the short inception of the relationship from the initial phone contact to marriage; the short period of time that the parties spent together both before and following their marriage and visa application; the contradictory information provided by the sponsor and applicant at time of interview about the inception of their relationship; and the contrived appearance of the photographic evidence.

CONSIDERATION OF CLAIMS AND EVIDENCE

18. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
19. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must

be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

20. The parties provided a certified copy of the parties' marriage certificate as recorded in the Marriage Register of the Socialist Republic of Vietnam. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

Financial aspects of the relationship – including joint ownership of assets, and joint liabilities; extent of pooling of financial resources, any legal obligations owed to the other party; any sharing of day-to-day household expenses.

21. No evidence regarding the financial aspects of the parties' relationship was provided at time of application. At time of review, evidence of three money transfers consisting of \$500 on 17 June 2016; \$700 on 16 July 2016; and \$500 on 19 November 2016 was provided. Asked at hearing what these were for, the sponsor said they were for 'family expenditure'. The applicant, when asked, said that the applicant had insisted on sending this money to help with 'family expenses', even though it was not needed, as she was employed and able to support her family.
22. At hearing the parties confirmed that neither of them regularly sent money to the other, and that they have not pooled their finances. The sponsor said he paid his own airfares to Vietnam and that he had paid the visa charges.
23. The sponsor provided evidence to the Tribunal that, as at 11 July 2016, he has listed the applicant and her son (a secondary applicant) as his superannuation beneficiaries.
24. Receipts were provided by the parties showing expenditure on the applicant's wedding dress, the wedding luncheon and the wedding photography.

Nature of the household – including any joint responsibility for care and support of children, parties' living arrangements; and any sharing of housework.

25. The parties said at hearing that when they started staying together during the sponsor's trips to Vietnam, from his second visit, they stayed in hotels. Evidence was provided in the form of receipts that they had booked into hotel rooms in December 2014, February 2015 and September 2015.
26. Evidence was provided that the sponsor had registered to stay in the district of the applicant's house in September 2016. At hearing the sponsor said that during his week's visit at that time that he stayed in the applicant's house with her mother and son. He said that during this visit he helped the household with 'manly activities'. He said that on other visits, even when he stayed in a hotel, he spent the day at the applicant's family home, helping with the cooking and maintenance jobs.

27. The sponsor was asked at hearing how much time, cumulatively, he and the applicant had spent under the same roof. He said three months in total. The applicant when asked the same question said 'over 80 days together'.

Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.

28. The parties claim that about 60 people attended their Western-style wedding ceremony and reception, in a restaurant in Ha Noi. None of the sponsor's family attended. He said his parents in Australia were too old to travel, his sister in Vietnam would have but had a motorcycle accident, and his brother who lives in Australia was too busy working. All of the guests who attended were family or friends of the applicant. As noted, many photographs were provided of the parties' wedding, showing the parties with combinations of the applicant's family members (apart from her daughter who remained in Australia to study) and friends. Asked why she held such a wedding ceremony, with white wedding dress, wedding party and professional photography, when she had recently divorced and so a low-key ceremony might be more in order, and when her daughter didn't attend and none of the sponsor's family or friends attended, she said she said that that sort of wedding was now traditional and normal in Vietnamese cities.
29. At hearing the applicant confirmed that she has, since the wedding, met the sponsor's sister. She said that she hadn't met any other members of the sponsor's family but that she has spoken to the sponsor's parents over the phone, although it was difficult to communicate with them as they are old and deaf and they speak differently accented Vietnamese.
30. A large number of photographs was provided showing the parties eating or standing in groups with family and friends and fellow tour participants while in Vietnam and on a trip to Cambodia.
31. A statutory declaration was provided by the sponsor's mother, in which she confirms that she has not conversed much with the applicant due to her hearing problem and their different accents. She states that her son showed her a lot of wedding photographs, that the applicant 'looks nice and kind', that she believes the relationship to be genuine because her son has spent a lot of time and money on his visits to Vietnam which he wouldn't do if he was not 'madly in love'. A similar statutory declaration, also signed in February 2017, was provided by a friend of the sponsor who has not met the applicant but who has seen the wedding photos and believes the relationship to be genuine because the sponsor has spent a lot of money travelling to Vietnam and he could see no other explanation for such dedication.
32. A lengthy and detailed statutory declaration was provided by the applicant's daughter, a secondary applicant, in which she describes how her biological parents argued and her biological father was often absent; how she met the sponsor at a relative's house while she was a student in Australia and arranged for him to contact her mother; how she spent time with the parties when she and the sponsor travelled to Vietnam in February 2015; how she observed that the sponsor would help with the housework and was a kind man; and how she believes the relationship to be genuine because she has observed that the parties are in a committed and affectionate relationship.
33. A written statement was made by the applicant's mother, stating that the sponsor spent time in her house during his visits to Vietnam; that the sponsor is very close to the applicant's children, especially the son who 'always hung on to him'; that the parties celebrated their birthdays together at her house in February 2017; and that she believes the relationship to

be genuine because they 'love each other's very much'. Photographic evidence was provided that the parties jointly celebrated their birthdays, with family and friends, in the applicant's mother's house.

34. The witness at hearing said he was a friend and acquaintance of the sponsor for 20 years, that they met up once a month or fortnight, that the sponsor had talked about his wife, that the sponsor was a kind and good man, and that he was sure he and the applicant would be a compatible couple.

Nature of persons' commitment to each other - including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.

35. Evidence was provided that the parties have contacted each other via phone and phone apps in 2014 and 2015. As the only records of conversation provided as evidence of relationship were brief messages in Vietnamese, it was not possible to see whether the nature and depth of their conversations are commensurate with a genuine spousal relationship. At hearing the sponsor claimed that he talked with the applicant every day. When pointed out that the evidence he provided showed only that they contacted each other every few days, or once or twice a week, he said that sometimes his wife didn't answer the phone. He then said that sometimes his wife called him, but this wasn't shown in the records provided.
36. Asked at hearing to explain how and why they married after such a short time of knowing each other and meeting face-to-face, they both said that they were sad and lonely and felt an immediate rapport with each from their first phone contact, because they had so much in common. Asked what it was that attracted the other, and what it was that they had in common, the applicant said the sponsor liked to sing and he understood her because he was sad and lonely like she was. The sponsor said he was attracted to the applicant because she was divorced and on her own like him and sad and lonely and that is what they had in common.
37. The applicant was still married to her first husband at the time that she and the sponsor established phone contact, but claimed to have been separated for some years. In her written statements and at hearing she claimed that she hadn't felt able to obtain a divorce while her mother-in-law, whose wrath and disapproval she feared, was still alive. At hearing she was vague and non-committal about when she had last seen her former husband, but acknowledged that her children remained in contact with their father, and that he had given his approval to their migrating with her to Australia. Evidence was provided that the applicant and her former husband reached an amicable property settlement around the time of her remarriage.
38. The primary applicant's daughter, a secondary applicant, who was a witness at hearing, provided written declarations (as noted above) and oral testimony at hearing in which she described her role in the parties' relationship and visa application. She claimed that when she first met the sponsor at the house of a relative they established an immediate rapport and a step-daughter/step-father type relationship so profound that it was recognised and remarked upon by other occupants of the house. This inspired her to give the sponsor her mother's phone number, because she knew her mother was sad and lonely and needed someone to talk to. Asked whether she gave her mother's phone number to the sponsor as a potential marriage partner she acknowledged that she did. The Tribunal asked why she thought the sponsor and her mother would be compatible, as the applicant is a 42 year-old accountant who works for the Vietnamese Union of Science and Technical Associations. The sponsor is a 50 year-old chicken boner who has worked in the same job for 30 years and hasn't learned to speak English after 30 years in Australia. The secondary applicant

repeated the story she had given in her written statements and already told at hearing, that she established an immediate rapport with the sponsor when they met at a relative's house and they recognised and related to each other so naturally in a step-daughter and step-father kind of way that other occupants of the house remarked on this, which inspired her to give the sponsor her mother's phone number, because she knew that her mother was sad and lonely.

39. Asked why she settled on someone she barely knew who lived in Australia as a marriage partner, when as she had acknowledged in a written statement she had no shortage of suitors in Vietnam, the applicant said Vietnamese men were too traditional. Asked why he settled on someone he barely knew who lived in Vietnam as a marriage partner, the sponsor said he wanted a real Vietnamese woman. Asked what went wrong with his previous marriage and sponsorship of a real Vietnamese woman, he said she didn't want children, which was a deal-breaker for him. He said he couldn't accept a childless marriage. He acknowledged that he might not have children with the applicant, but said this didn't trouble him as he had been able to bond with and bestow fatherly love on the children that the applicant already has. He said this had been of great importance to him, and he had particularly bonded with the applicant's son. Asked at hearing how old the boy was, he hesitated, thought for a while then said that he was born in 2001. Asked what the boy liked to do, he said he went to school. Asked what he was studying in school, what subjects he was doing or liked best, the sponsor said he went to school. Asked what year the boy was in and what subjects he was studying the sponsor said he didn't know and had not asked. (The applicant said later at hearing that her son was 16 years old and in year 10). There is nothing in the very large amount of photographic evidence provided that suggests that the sponsor has developed a close relationship with the applicant's son. In the few photographs where they are shown together the boy appears to be indifferent to the people around him or unhappy with the proceedings.
40. Generally written statements of support were provided by a friend and a colleague of the applicant, both of whom attended the wedding. Generally worded statutory declarations were provided by the sponsor's mother and friend, neither of whom have met the applicant and both of whom declare they believe the relationship to be genuine because the sponsor would not have spent good money travelling to Vietnam otherwise. Statutory declarations provided by the applicant's mother and daughter, both of whom have met the applicant, were more specific and detailed. The applicant's mother gave as a reason for believing the relationship to be genuine, that the sponsor and the applicant's children, especially the boy, had bonded in a step-father type relationship. The applicant's daughter, a secondary applicant, repeated her story about the instant rapport and recognition of the sponsor as a father-figure she felt on their first meeting, how this instant rapport and recognition was so potent it was recognised by the people around them, and how she gave the sponsor her mother's phone number.

Any other relevant considerations

41. The Tribunal raised with the sponsor concerns identified by the delegate following interviews with the applicant and the sponsor at time of application. Before doing this the Tribunal advised the sponsor, as required under S.359AA of the Act, that it had information that could lead or contribute to the decision under review being affirmed. The Tribunal said that this information was contained in the report of the Departmental interview and in the decision which drew on them. The sponsor was advised that he could seek an adjournment if he wanted to consult with his agent or consider his response. The sponsor said he didn't need an adjournment. He said he had, through his agent, provided a detailed response to the delegate's decision (which was attached to the Tribunal file), and that this included a response to the report of the interviews.

42. When asked at interview when the parties had first contacted each other, the applicant is reported as saying that the sponsor contacted her in December 2013 on New Year's Eve. She said that they just talked as friends, as two lonely people, and that the notion of marriage hadn't entered her mind at this stage. She said they talked to each other often during the early months of 2014 after the sponsor first introduced himself, that she picked him up at Noi Bai airport when he flew to Vietnam to meet her in person in July 2014, and that they didn't discuss marriage until September 2014. The sponsor, when asked when he first met the applicant, said, 'in July 2014, I travelled to Vietnam to visit parents of my friend. (The secondary applicant) gave me (the applicant's) phone number but I didn't think about that. I just travelled to Vietnam for holiday'. Asked when he first contacted the applicant, he is reported as saying 'In June before I travelled to Vietnam'. He said he stayed in a hotel in Ha Noi during one week of this visit and that he met up with the applicant at this time. Asked when he first discussed marriage with the applicant, he said September 2014. Both the applicant and her daughter, the secondary applicant, however, acknowledged at hearing that the parties had been introduced to each other as prospective marriage partners. The secondary applicant acknowledged also that she had discussed the potential of the sponsor as a marriage partner with her mother before giving the sponsor her phone number.
43. The sponsor, through his agent at time of review, submitted that his interview had been incorrectly recorded, and that the version of events provided by the applicant was the correct one. The Tribunal has considered his submission but has no reason to doubt that the interview with the sponsor was conducted otherwise than professionally and with the normal protocols. The Tribunal has reached the conclusion that the sponsor is not a credible or reliable witness, based on his conflicting accounts of the inception of the relationship and the weakness of his story about his desire and need to lavish fatherly love on the applicant's children. The Tribunal notes that he has named the applicant's son (since 11 July 2016) as a beneficiary in his superannuation, but suspects that this was done for the purpose of providing evidence of relationship for the visa application. The Tribunal does not accept his or his mother-in-law's claims, and there is no evidence apart from this superannuation statement that he has, as claimed, established strong fatherly bonds with the applicant's children and particularly her son.
44. The Tribunal likewise does not accept as plausible the story provided by the secondary applicant about the instant rapport and epiphany she experienced meeting and recognising the sponsor as a replacement or step-father. Her story has the appearance of being fabricated and rehearsed. Tribunal notes the vested interest the secondary applicant has in the Partner visa application, as her student visa is due to expire later this year on completion of her accountancy degree.

Findings

45. The Tribunal accepts that the sponsor has sent money to the applicant, especially in the period leading up to review, but notes that this was occasional, for no particular purpose, and not part of a pattern of spousal support. The Tribunal suspects that these money transfers were organised to provide evidence of relationship. The Tribunal accepts that the parties married, that members of the applicant's family and some of her friends and colleagues in Vietnam attended the wedding and know her to have remarried, and that the sponsor's family and some of his friends in Australia know that he has remarried. The Tribunal does not accept that the parties' participation in a much-photographed ceremony constitutes proof that they are in a genuine spousal relationship. Nor does it accept, on the basis of generally worded statutory declarations and because they have undertaken much-photographed trips to visit relatives and tourist sites within Vietnam, that the parties are known and related to by family and friends as a socially functioning married couple. The Tribunal notes that the parties have not established a joint household together during the sponsor's visits to Vietnam. The Tribunal notes the large number of photographs, including those showing the

parties draped over a bed, purporting to show intimacy, but is not convinced that these photographs were not contrived for the purpose of the visa application. The Tribunal places little weight on the photographs as supporting evidence of a genuine and continuing relationship and a mutual commitment to a shared life as husband and wife. The Tribunal noted the claims made by the parties and supporting witnesses that their relationship is genuine, and noted the sponsor's claim that they communicated daily, but was not satisfied that the evidence supported these claims. No convincing evidence was provided to the Tribunal that, at time of application or decision the parties provided and drew from each other the degree of companionship and emotional support to be expected in a relationship where there is mutual commitment to a shared life as husband and wife.

46. Having considering the matters as required under r.1.15A(3) the Tribunal is not satisfied that the parties have a mutual commitment to shared life to the exclusion of others, that they in a genuine and continuing relationship, and that they live together and not separately and apart on a permanent basis.
47. Given these findings the Tribunal is not satisfied that at the time the visa application was made and the time of this decision the parties were in a spousal relationship.
48. Therefore the visa applicant does not meet cl.309.211 or cl.309.221.
49. As the primary applicant does not meet the criteria for the visa, neither do the secondary applicants.
50. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

DECISION

51. The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas.

Adrienne Millbank
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).